United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-1064

To be argued by
LEONARD J. MEISELMAN

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

—against—

JOHN McGRATH,
Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT JOHN McGRATH

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against- Docket No. 77-1064

JOHN McGRATH,

Appellant.

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TYPOGRAPHICAL CHANGES IN APPELLANT'S BRIEF

Bigro v. Hiatt, 70 F.Supp. 826 (D.C.Pa 1947), adhered to 84 F.Supp. 240 (D.C.Pa) aff'd 168 F.2d 992 (3rd Cir. 1948), appearing in the Table of Cases and Authorities and on Page 21 of the Brief, should read as follows:

> Bigro v. Hiatt, 70 F.Supp. 826 (D.C.Pa 1947), adhered to 74 F.Supp. 240 (D.C.Pa) aff'd 168 F.2d 992 (3rd Cir. 1948).

Donhan v. United States, 372 U.S. 734, appearing in the Table of Cases and Authorities and on Page 20 of the Brief, should read as follows:

> Downum v. United States, 372 U.S. 734.

Stans v. Gagliardi, 45 F.2d 1290 (2d Cir. 1973), appearing in the Table of Cases and Authorities and on Page 29 of the Brief, should read as follows:

> Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973).

Legislative Memoranda, Article 9, appearing in the Table of Cases and Authorities and on Page 11 of the Brief, should read as follows:

> Legislative Memoranda, Article 13.

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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- -

BRIEF FOR APPELLANT JOHN McGRATH

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Appellant JOHN McGRATH appeals from his conviction in the United States District Court for the Eastern District of New York on three counts of violation of the Hobbs Act (18 U.S.C. Sec. 1951), five counts connected with the filing of false income tax returns (26 U.S.C. Sec. 7201), and five counts relating to the evasion of taxes on the same returns (26 U.S.C. Sec. 7206(1)).

The case was tried before the Hon. Henry J. Bramwell and a jury. In the evening of the third day of deliberation, the jury returned a verdict acquitting the defendant-appellant* on Counts Eleven and Twelve (Hobbs Act) and convicting him on the ten income tax counts and the remaining three Hobbs Act counts.

ISSUES PRESENTED

1. Whether the Trial Court erred in denying defendant's motion to dismiss Counts Eleven through Fifteen, as a matter of law, on the ground that they were fatally defective.

2. Whether the Trial Court erred in accepting an "amendment" to the Indictment returned by a Grand Jury convened after the commencement of trial and jeopardy had attached.

3. Whether the Trial Court erred in failing to advise the jury of the "amendment" to the Indictment, either during trial or in its charge.

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*The defendant-appellant is hereinafter referred to as the "defendant", unless otherwise stated.

4. Whether the Trial Court abused its discretion under Federal Rules of Criminal Procedure Rule 14 in denying the defendant's pretrial motion to sever Counts One through Ten from Counts Eleven through Fifteen because of prejudicial joinder.

5. Whether the Trial Court, after a voir-dire hearing, erred in denying a motion to dismiss and in the submission of Count Fourteen to the jury when there was no evidence to support the same.

6. Whether the Trial Court's evidentiary rulings and the Government's unfairness constituted reversible error in connection with the following:

(a) The duplicity of the Government in connection with the identification of Randolph W. Taylor, Jr.

(b) The hearsay testimony of Joseph Foley neither related nor connected to the issues raised at trial.

(c) The exhibition to the jury of prejudicial charts.

NATURE OF CASE

The defendant, JOHN McGRATH, is a sixty-six year old retired civil servant with a heretofore unblemished record (2037, 2041-2042)*. He started his employment as an attendant at the Jones Beach State Park in 1930, and was continuously in civil service for the next forty-four years, until he retired in 1974 (2038-2040). He is held in very high regard in the community (1902-1909, 1978-1980, 1984-1986, 1986-1987, 1990-1993, 2031-2034-a).

In 1976, well after his retirement, the defendant was arraigned on a fifteen-count indictment, five of which related to receiving money under the color of official right (Hobbs Act), five counts related to filing false income tax returns, and five counts related to evasion of income taxes. The income tax counts include alleged unreported income received in violation of the Hobbs Act, and other unreported income.

The Indictment charged and the Government attempted to prove the Hobbs Act counts, mainly by the testimony of five

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*Numerals in parenthesis refer to pages of the transcript of the trial.

towing operators who claimed that each had paid the defendant moneys for fear of losing their respective towing privileges on the Long Island parkways. Testifying on behalf of these entities were Charles Ancona, for Charlie's Auto Center (Count Eleven); Victor LaGuardia, for Triple Arc Collision Incorporated (Count Twelve); Ralph Signoriello, for Alray Collision Corporation (Count Thirteen); Santo Russo, for Russo Brothers Service Station, Inc. (Count Fourteen); and Salvatore Gullo, for Sal Gullo's Garage, Inc. (Count Fifteen).

All but Gullo had testified before the Grand Jury denying that they had given any moneys to the defendant or anyone else. Mr. LaGuardia was thereafter indicted for perjury. The towers, of course, had been closely questioned in the Grand Jury about their books and records concerning receipts of large amounts of cash money received from motorists on the parkways. LaGuardia, in order to extricate himself from both the perjury charge and his tax problems, "made a deal" with the United States Attorney in which it was agreed that his perjury indictment would be dismissed and that he would get immunity if he testified, but his "* * * testimony was not enough * * *", and he "* * * had to get other people to corroborate (him)" (603). His attorney's efforts to obtain other people's testimony to "back him up"

culminated in a meeting at a motel in Riverhead, at which most of the towers were present (603-604, 1736, et seq.). Despite denials by some of the towers that they had paid any money to the defendant, Charles Ancona insisted: "Well, I think if we work together to get our stories straight, we can get a better deal" (1751-1752). It was after this obvious conspiracy that the "victims" made a deal with the Government, purported to recant their testimony given before the Grand Jury, and thereafter testified at the trial against the defendant.

At a pretrial motion, the defendant moved to sever Counts One through Ten (the income tax counts) from Counts Eleven through Fifteen (Hobbs Act counts), on the ground of prejudicial joinder. The motion was denied.

On October 13, 1976, the Indictment was read to the jury panel and the jury selected and sworn. On October 14, 1976, both sides opened to the jury and the Government called its first witness. At that point, the defendant moved to dismiss Counts Eleven through Fifteen of the Indictment (the Hobbs Act counts), pursuant to Rule 7(c)(1)* and the Fifth and Sixth Amendments to the Constitution of the United States,

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*The Federal Rules of Criminal Procedure shall be hereinafter referred to as the "Rules", unless otherwise stated.

on the ground that, as a matter of law, the Indictment was fatally defective. To give the Government time to submit a brief in response to such motion, the Court adjourned the trial to October 18, 1976. On that date, during further oral argument, the Government advised the Court, for the first time, that the Government had, in the interim, reconvened the Grand Jury and submitted an "amendment" to the Indictment. The Court accepted the "amendment" and denied the defendant's motion on the ground that the defect was not jurisdictional and, therefore, not timely made under Rule 12(d)(1)(B). The Court never advised the jury as to any amendment, alteration or change of the Indictment which had previously been read to them.

Despite a request to do so, the Court omitted to charge the jury that such an "amendment" had been made and, again, only read the original Indictment to the jury.

The jury acquitted the defendant on Counts Eleven and Twelve, but convicted him on the ten income tax counts and the three remaining Hobbs Act counts. The defendant, however, was sentenced under the "amended" Indictment.

POINT I

THE DENIAL OF THE MOTION TO DISMISS COUNTS ELEVEN THROUGH FIFTEEN: THE ACCEPTANCE OF AN "AMENDED" INDICTMENT AFTER JEOPARDY HAD ATTACHED: AND THE FAILURE TO DISCLOSE SUCH AMENDMENT TO THE JURY CONSTITUTED A DEPRIVATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS AND DENIED HIM A FAIR TRIAL.

A

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS COUNTS ELEVEN THROUGH FIFTEEN OF THE INDICTMENT MADE PURSUANT TO FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 7(c)(1) AND THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION ON THE GROUND THAT, AS A MATTER OF LAW, THE INDICTMENT WAS FATALLY DEFECTIVE.

The pertinent parts of the Rule and the Amendments in question are as follows:

"Rule 7:

(c)(1). In general. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *".

The Fifth Amendment:

"No person shall be held to answer for a capital or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, * * *."

The Sixth Amendment:

"Rights of the Accused. In all criminal prosecution, the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation; * * *."

After the trial had begun and jeopardy had attached, defendant moved to dismiss Counts Eleven through Fifteen (39). The Court, in deyning the motion, held that the defect was not jurisdictional and, therefore, not timely made (96-97).

Counts Eleven through Fifteen all allege offenses under Title 18, United States Code, Sec. 1951 (the Hobbs Act). Each count, with the exception of informational data*, has the same language. The pertinent provisions of Count Eleven are as follows:**

> "1. At all times relevant herein, Charlie's Auto Center * * * was engaged in the business of providing * * * automotive towing services. Charlie's Auto Center operated as tow truck operators * * * over a particular segment of the Long Island state parkways, and was subject to the authority, direction, supervision and control of the Long Island State Parks and Recreation Commission.
>
> 2. At all times relevant herein, JOHN McGRATH, the defendant, was Park Maintenance Supervisor of the Long Island State Parks and Recreation Commission, and. as such, supervised towing operations on the Long Island state parkways. Accordingly, JOHN McGRATH * * * had the power and was reasonably per-

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*Count Eleven - Charlie's Auto Center, starting January 1970.
Count Twelve - Triple Arc Collision Incorporated, starting July 1968.
Count Thirteen - Alray Collision Corporation, starting January 1970.
Count Fourteen - Russo Brothers Service Station, Inc., starting January 1970.
Count Fifteen - Sal Gullo's Garage, Inc., starting January 1970.

**Underscoring has been added for emphasis only and to call to the Court's attention particular phraseology of singular importance to the motion.

ceived * * * to have the power to adversely affect the towing business of Charlie's Auto Center on the Long Island state parkways.

3. In or about and between January, 1970 and December, 1973, * * * the defendant, knowingly, wilfully and unlawfully * * * did obstruct, delay and affect commerce * * *."

During the years 1968, 1969, 1970, 1971 and up to September 1, 1972, the Long Island State Parks and Recreation Commission was not in existence.

Prior to September 1, 1972, certain of the Long Island state parks and parkways had been owned, administered and supervised by the Long Island State Park Commission, created pursuant to the laws of 1928 (New York Conservation Law, Sec. 672) under the jurisdiction of the Conservation Department of the State of New York. The powers of the Long Island State Park Commission were set forth in Conservation Law, Sec. 777. Patently, it was an autonomous body and this was corroborated by the testimony elicited during trial (1852).

In 1972, the New York Legislature enacted a completely new statute entitled "Parks and Recreation Law" (PRL). Pursuant to PRL, Secs. 7.01(9) and 7.03(7), the New York State Department of Parks and Recreation was created.

This new department designated Nassau and Suffolk counties as a geographical area and formed a new commission called the Long Island State Parks and Recreation Commission to carry out the directions of the State Commissioner of Parks and Recreation (in Albany), the executive head of the New York State Department of Parks and Recreation. (PRL, Secs. 3.09 et seq.)*.

The Office of State Commissioner of Parks and Recreation was under the jurisdiction of the Executive Department of the State of New York (PRL, Sec. 3.03). The Long Island State Parks and Recreation Commission was mandated to serve the State Commissioner of Parks and Recreation mainly in an advisory capacity, all subject to the direction of such Commissioner (PRL, Sec. 7.11).

Thus, the powers of the Long Island State Parks and Recreation Commission were limited in nature (PRL, Sec. 7.11), as compared to the extensive autonomous powers given by the Conservation Law (Sec. 777) to the Long Island State Park Commission. Effective September 1, 1972, the Long Island State Park Commission ceased its existence.

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*See also Article 9 of the Legislative Memoranda (McKinney's PRL) p. VII, and PRL, Sec. 7.11.

It was only with the passage of the new law that on September 1, 1972, the property of the Long Island State Park Commission was conveyed to the New York State Parks and Recreation Commission (PRL, Sec. 13.01).

Thus, prior to September 1, 1972, contrary to the Indictment, it would have been impossible for the defendant to be the "Parks Maintenance Supervisor for the Long Island State Parks and Recreation Commission", since such body had not yet been created. It would have been equally impossible, as alleged in the Indictment, for the Long Island State Parks and Recreation Commission to have employed the defendant or to have had jurisdiction over any Long Island parkways and the alleged victims of the extortion.

In Ex Parte Bain, 121 U.S. 1 (1887), the indictment charged that the acts of the defendant were to "deceive any agent appointed by the Comptroller of the Currency to examine the affairs of said association". The Government moved to amend the indictment by striking out the words, "the Comptroller of the Currency". The Supreme Court of the United States held that this could not be done, stating, at page 5:

> "* * * we are at once confronted with the fifth of those articles of amendment, adopted early after the Constitution itself was formed, and

> which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of these rights by declaring that 'no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury,' except in a class of cases of which this is not one."

In Bain, the government's argument was that the words, "Comptroller of the Currency", were surplusage and the grand jury would have found the indictment without this language. The court disposed of this argument, at page 9:

> "But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument."

The court continued, at page 10:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notion of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer," may be frittered away until its value is almost destroyed."

After citing authority in support of its position, the court then went on to say, at page 13:

> "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offence originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered."

The Supreme Court's ruling that an indictment based on a non-existent public office is jurisdictionally fatal and may not be amended, has been cited with approval to the present time. It is submitted that it is controlling in the case at bar.

In Stirone v. United States, 361 U.S. 212 (1960), the defendant had been charged, under the Hobbs Act, with interference with commerce in the delivery of sand in connection with the construction of a steel plant. Not charged in the indictment was interference with commerce in connection with future shipments of steel from such plant after its construction. Interference with future shipments of steel was proved on the trial over objection. The Supreme Court held that since it was

not charged in the indictment, it was a fatal error. Citing Ex Parte Bain, as its authority, the Court held that the defendant had been convicted of an offense beyond that charged in the indictment. The Court stated, at page 217:

> "The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also United States v. Norris, 281 U.S. 619, 622. Cf. Clyatt v. United States, 197 U.S. 207, 219, 220."
>
> * * * *
>
> "Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports here is neither trivial, useless, nor innocuous. Compare Ford v. United States, 273 U.S. 593, 602; Goto v. Lane, 265 U.S. 393, 402. While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."

In the case at bar, the Indictment contained no mention of the Long Island State Parks Commission, an essential element of the case.

In United States v. Agone, 302 F.Supp. 1258 (S.D.N.Y. 1969), the indictment did not name the victims of the extortion.

The court dismissed the indictment, stating, at page 1259:

> "The plain and concise words of Rule 7(c) implement vital guaranties of the Fifth and Sixth Amendments. The Rule makes it unnecessary, of course, to treat as a constitutional issue every dispute about whether an indictment is sufficiently clear and unambiguous. But the pertinent criteria derive none the less from our fundamental law--from the right not to be tried at all unless citizens comprising the grand jury have voted an indictment, and from the right 'to be informed of the nature and cause of the accusation * * *.' Russell v. United States, 369 U.S. 746 * * *."

and, at page 1261, the court said:

> "It may be conceded that the indictment, though most vaguely on a key subject, asserts in general terms the elements of the offense. It is still critically deficient. For it reveals, on the government's own submissions, a failure by the grand jury to complete and record with certainty the task it (exclusively) has under the Fifth Amendment. The grand jury has neither said nor explained its failure to say who among a substantial number of possibilities is supposed to have been the target of the alleged crime. It has left the prosecution free to fill in this vital missing element--free, in a way which is constitutionally grave whether or not it is highly probable, to name someone different from the one intended by the grand jury. A prosecutorial power 'to roam at large' in this fashion is not allowable. Russell v. United States, supra, * * *."

With reference to the instant defect, the Government argued below that it was immaterial. The same type of argument was raised by the government in United States v. Consolidated

Laundries Corporation, 291 F.2d 563 (2d Cir. 1961). The indictment there named the defendant as "Standard Coat Apron & Linen Service, Inc.". The government moved to amend the indictment to read, "Standard Coat, Apron & Linen Service, Inc." This Court held, at page 571:

> "Although the addition of the comma might superficially appear to be only a correction of a typographical error, the change actually substituted as a defendant a 1951 corporation for a dissolved 1941 corporation. The substitution violated the rule laid down in Ex Parte Bain, * * * where the Supreme Court adopted the common law rule that an indictment cannot be amended by the court. This court followed the Bain decision in Dodge v. United States, 2 Cir., 258 F. 300. * * * certiorari denied 250 U.S. 660 * * *. It is true that some circuits have held the rule applicable only to amendments of substance and not amendments of form. Such an exception is not here applicable. The substitution of one defendant for another cannot by any stretch of imagination be considered one of form only."

As we have seen, it would have been impossible for the Long Island State Parks and Recreation Commission, prior to September 1, 1972, to have had jurisdiction over any of the parkways or to have employed the defendant. Thus, as a matter of law, it was impossible for the defendant to have been an employee of the Long Island State Parks and Recreation Commission, and possess any of the powers the Indictment charged.

This error goes far beyond the categories of form, misnomer or typographical error, and involves substantial allegations in the Indictment necessary to charge the crime. These allegations were necessary prerequisites pertaining to the very substance of the offenses charged.

The charges in the Indictment, pertaining to the relevant public body and the defendant's office, were essential to a charge of extortion under color of official right. Having improperly charged the defendant with holding office in a non-existent public body, the Indictment was defective.

In denying defendant's motion to dismiss Counts Eleven through Fifteen, the Trial Court said, in part:

> "It is a question as to whether or not the issue which was raised by the defendant is jurisdictional in effect and it is the Court's position that it is not, and under the circumstances the Court agrees with the position taken by the Government.
>
> It would appear that the defendant has waived his objection under Rule 12(b) of the Federal Rules of Criminal Procedure, he has failed to set forth a jurisdictional defect in the indictment, he has failed to set forth a material variance and has not shown actual or possible prejudice." (97)

Rule 12 provides that motions are to be made prior to trial unless they fall within the exceptions of 12(b)(2). The stated exceptions are motions relating to the issues of juris-

diction and failing to charge an offense. Motions addressed to these exceptions may be made at any time.

The Trial Court held that defendant's objections were not jurisdictional and, therefore, the motion was untimely. It did not pass upon the question of whether the Indictment charged an offense, the other exception in Rule 12(b)(2).

> The Indictment does not charge an offense.
>
> "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by the indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment." Ex Parte Bain, supra.

Counts Eleven through Fifteen charged the defendant with specific offenses based on a non-existent public office in a non-existent public body. As a matter of law, the Court below did not have jurisdiction of the offense charged, and defendant's motion to dismiss was timely and should have been granted.

B

THE TRIAL COURT ERRED IN ACCEPTING AN AMENDMENT TO THE INDICTMENT RETURNED BY A GRAND JURY CONVENED AFTER THE COMMENCEMENT OF THE TRIAL.

The motion by defendant to dismiss Counts Eleven through Fifteen on the ground that the Indictment was fatally defective was made after the jury had already been sworn, the Indictment had been read to the jury, opening statements made by both sides, and the defendant placed in jeopardy. See Donhan v. United States, 372 U.S. 734.

On the argument of the motion, the Court adjourned the trial for several days to give the Government an opportunity to submit a brief. When the Government attempted to make light of the objections raised, claiming them to be irrelevant, the Trial Court said:

> "I am not sure it is irrelevant."
>
> * * * *
>
> "I think Mr. Meiselman was quite persuasive. And I think you are going to have to address yourself to it because it is something that the Court has got to handle before this case proceeds. And it seems to be a serious issue with broad implications for the Government." (52)

Before the adjourned date, the Government, in obvious recogni-

tion of the substantial error in the Indictment, allegedly reconvened the Grand Jury and purportedly obtained an "amendment". The "amendment" reflects a tailoring of the Indictment to meet the facts and law adduced on the motion. On the day the Court reconvened, the "amendment" was submitted to the Court for the first time. Over the defendant's objection, the Court "accepted" the "amendment" of the Indictment (98). The trial thereafter continued as if the amendment was nunc pro tunc, and without notice or advice to the jury of the "amendment". It is submitted that the nomenclature of "amendment" was contrived to avoid the use of the forbidden superseding indictment during the course of a trial. Its purpose and function was the same. Permitting such an amendment at trial is patently improper, unfair and prejudicial to the defendant, and in violation of the Sixth Amendment of the Constitution.

The solemnity of the indictment is sacrosanct. Bigro v. Hiatt, 70 F.Supp. 826 (D.C.Pa. 1947), adhered to, D.C.Pa. 1947, 84 F.Supp. 240, aff. 168 F.2d 992 (3rd Cir. 1948).

It is a sine qua non that the indictment informs the defendant of the charges against him and only the Grand Jury may issue such indictment. Once a trial has commenced and the

defendant thus placed in jeopardy, it is highly improper for the Grand Jury to receive further testimony or instruction from the prosecution and change the indictment to meet the exigencies of the Government's case.

In the course of the argument below the Government relied upon and referred to United States v. Cahn (unrep.), claiming that an amendment permitted therein was precedent for the Trial Court to accept the amendment in this case. Research and inquiry to Mr. Cahn's various counsel indicate that there were two amendments in that case. The first amendment, issued between the first and second trials, is irrelevant to this appeal. The subsequent amendment was during the second trial. The trial record indicates that the amendment was treated as a mere typographical error, not seriously opposed by the defendant. It was not raised on appeal.

Such is not the case here. The Government's action in attempting to amend the indictment, by itself, limns the gravity of the defect. The instant case thus appears to be one of first impression for this Court's consideration.

The inherent unfairness and prejudice of allowing a Grand Jury to return an "amendment" to an indictment during the course

of trial is obvious. Forced to its logical conclusion, we see a never-ending stream of "amendments" with a Grand Jury hearing testimony figuratively side by side with a petit jury, each successive amendment attempting to backstop the prosecution's countermove.

C

THE DEFENDANT WAS CONVICTED AND SENTENCED ON DIFFERENT INDICTMENTS.

On the voir dire selection, the Trial Court read the Indictment to the panel. During the trial, the Court accepted the "amendment" outside the presence of the jury, never advising the jury that there had been any amendment, alteration or change in the Indictment. The case was then, perforce, tried by the Court and counsel on the basis of the "amended Indictment. Evidence was adduced concerning the defendant's employment with the Long Island State Park Commission and the Long Island State Parks and Recreation Commission between 1968 and 1973.

After both sides had rested, the Trial Court held a conference to discuss requests and the Court's proposed charge.

At such conference, defendant requested the Court (2449):

> "* * * I will ask your Honor to tell the jury that in the middle of trial, after the jury had been sworn, the Grand Jury met and found an amendment to an indictment a proposed amendment to an indictment * * *."

Nevertheless, the Trial Court in its charge read the counts of the original Indictment, referring only to the Long Island State Parks and Recreation Commission and omitted any reference to the "amendment" or to the fact that the Long Island State Parks and Recreation Commission was non-existent prior to September 1, 1972.

The defendant excepted to that portion of the charge (2743).

Not knowing of the "amendment", the jury could only have deliberated and reached a verdict on the Indictment as originally cast. The Court passed judgment on the defendant based on an "amended" indictment.

Accordingly, the defendant has been sentenced to jail based on a conviction under an indictment which the jury never considered.

POINT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PRETRIAL MOTION TO SEVER COUNTS ONE THROUGH TEN BECAUSE OF A PREJUDICIAL JOINDER OF OFFENSES IN VIOLATION OF RULE 14.

Defendant, on a pretrial motion, moved pursuant to Rule 14 for severance of Counts One through Ten from Counts Eleven through Fifteen. The Court denied the motion, stating:

> " The Court does not feel that there is prejudice by the joinder of offenses in connection with this proceeding" (pretrial trans. p. 9).

Under Rule 8(a), two or more offenses may be charged in the same indictment where the offenses are of similar character or are based on the same act or transaction. Rule 14, however, recognizes that prejudice may result from failure to sever in certain situations. The Rule provides, in pertinent part:

> "If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *"

Concededly, economy of trials is a desirable goal. However, a defendant may be so prejudiced where two or more offenses

are joined in the same indictment that a fair trial mandates the offenses be severed:

> "There are, * * * three kinds of prejudice that may occur if separate offenses--and particularly those that are merely of 'similar character' and do not arise out of a single transaction--are joined. These are: (1) the jury may consider that a person charged with doing so many things is a bad man who must have done something, and may cumulate the evidence against him; (2) proof that defendant is guilty of one offense may be used to convict him of another even though proof of that guilt would have been inadmissible at a separate trial; and (3) defendant may wish to testify in his own defense on one charge but not on another." 1 Wright, Federal Practice & Procedure, Section 222 (1969).

The case at bar is inapposite to those cases where a defendant is charged with a crime involving the illegal acquisition of income (e.g., bribery, Hobbs Act, embezzlement) to which the Government tacks on corresponding income tax counts charging the defendant with failure to report the ill-gotten moneys. Cf. United States v. Isaacs, 493 F.2d 1124, cert. denied, 417 U.S. 976. Here, in the income tax counts, the Government charged defendant with not only failure to report the Hobbs Act moneys, but also with failing to report other moneys: (1) minimal amounts of interest on bank accounts; (2) summer rents; and (3) two sales of residential property.*

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*Government's Bill of Particulars; McGrath Appendix

When the Government offered proof of the above items, any real option the defendant had with respect to this testifying was lost. The items raised inferences of evasion and false returns which could only be explained by the defendant testifying.

The finding of guilt on any one of the Hobbs Act counts mandated the jury finding the defendant guilty on the income tax counts, at least with respect to the Hobbs Act moneys. Accordingly, in light of the verdict, it is impossible to determine whether the jury believed defendant's explanation with respect to the non-Hobbs Act income. The attenuating circumstances created a situation where the Government unfairly was able to place in issue, inter alia, charges concerning other evaded income irrelevant to the major issues before the jury and which ultimately swung the issue of credibility against the defendant.

Jury deliberations started on November 10, 1976 at 6:20 P.M. (2745). On November 11, 1976, at 4:40 P.M., the Court received a note from the jury* (2762): "Your Honor, we are in a deadlock concerning the extortion counts. May we please. (sic) have further instructions as to what to

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*Court Exhibit 7.

do". The Court recharged on Counts Eleven through Fifteen as originally charged (2764-2775). On November 12, 1976, at 6:10 P.M., the jury sent another note*: "We have concluded that we cannot reach a unanimous decision on counts 11 through 15. Please instruct us, your Honor, as to the other counts" (2795). The following colloquy then ensued:

> "THE COURT: Now, without telling me. I don't want to know what your, whether you've reached a decision on, what your decision is, I definitely don't want to know what your decision is as to counts 1 through 10; do you have a decision on counts 1 through 10?
>
> FOREMAN: No.
>
> THE COURT: You don't?
>
> FOREMAN: No." (2809-2810)

On November 15, 1976, at 10:40 A.M., the Court, over defendant's objection, and denying a motion for mis-trial, gave an Allen-type charge. The jury rendered its verdict at 4:50 P.M.

A consideration of the progress of the jury deliberations shows that it was the Hobbs Act counts upon which the jury was deadlocked (2761-2762, 2813). In view of the evidence, it is submitted that defendant's fate on all the counts hung on

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*Court Exhibit 11

his credibility, including his explanation of the non-Hobbs Act income.

A motion pursuant to Rule 14 is addressed to the discretion of the court. United States v. Olson, 504 F.2d 1222 (9th Cir. 1974); United States v. Mitchell, 372 F.Supp. 1239 (S.D.N.Y), app.dis.sub.nom.; Stans v. Gagliardi, 485 F.2d 1290 (2d Cir. 1973). When joinder of offenses causes an actual or threatened deprivation of a fair trial, severance is no longer discretionary with the court. United States v. Butler, 494 F2d 1246 (10th Cir. 1974).

The five counts of filing false income tax returns are, in effect, a prosecution for perjury. The five counts of tax evasion charge the defendant with cheating. The basic and obvious reason for the rule on prejudicial joinder is to avoid the cumulation of guilt in the minds of the jury that washes over from one count to the other, and causes dual convictions where there might not have been a single conviction; and to avoid the prejudice that comes from having the petit jury know that the Grand Jury believed the defendant was a liar and a cheat, in addition to being a violator of the Hobbs Act. The very nature of the beast is that the trial jury would know that the defendant has been indicted for lying and cheating on in-

come tax returns, which information would never be admissible if he had been tried for the Hobbs Act case standing alone. It is urged that such evidence was devastatingly prejudicial to the defendant.

The Government created a built-in advantage by drafting a single indictment and by tacking on charges, parts of which were not inter-related. The Indictment thus presented a classic instance of the sort of prejudice which enlightened courts have consistently held requires severance under Rule 14.

Although some prejudice is inherent in any multiple-count indictment, Rule 8(a) is designed to "set the limits of tolerance, and any joinder which does not fall within it is per se impermissible". King v. United States, 355 F.2d 700, 703 (1st Cir. 1966), citing Ward v. United States, 289 F.2d 877, 110 U.S. 136 (App.D.C., 1961).

In United States v. John B. Connally, Cr. 74-440 (11/25/75), Judge George L. Hart, Jr. of the District Court for the District of Columbia, granted the defendant's motion to sever perjury counts from substantive bribery counts. In so doing, the Judge said:

> "THE COURT: Let's get back to the fundamental situation where you indict someone for a substantive offense, and you also indict them for perjury in the same indictment.

Now, when the matter goes to the jury, it is certainly true, a petit jury, that they constantly have before them the fact that before the grand jury, particularly where the defendant has appeared before them, he wasn't telling the truth.

It has always seemed to me, despite the fact that it has been permitted in some cases, that that can be highly prejudicial. I just have trouble seeing how you avoid it."

* * * *

"THE COURT: Well, while expedition of justice and saving of trial time is highly desirable, it is not desirable to the extent of vitiating a fair trial."

* * * *

"THE COURT: Well, I must admit that where the defendant has appeared before the Grand Jury and has been indicted for perjury in addition to the substantive offense, that the possibility of this working against the defendant in an unfair manner has always worried me a great deal, not only in this case, but in some other cases that weren't my own to decide.

And while judicial time is important, and the time of everyone else is important, it is even more important that we have a fair trial."

Where the issue of prejudice is in doubt, it should be resolved in favor of the defendant. In Hill v. United States, 418 F.2d 449, 451 n.5 (1968), the court noted:

"Even when evidence of one crime is in or near the zone of admissibility to prove the other, prejudice may result if the handling of the

> evidence at introduction, on argument, or in instructions, tends to blur the limited, evidentiary use. When the issue is doubtful, ultimate wisdom may lie in separation rather than combination."

In Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964), the court, holding two offenses properly joined under the "similar offense" test, nevertheless, reversed the conviction because the joinder of the events occurring two and a half weeks apart was prejudicial.

In the case at bar, the defendant was prejudiced because of the cumulative effect of admitting, at the trial of the Hobbs Act counts, unrelated income evidence of the alleged tax crimes equatable to perjury and cheating. The court must presume prejudice in such a situation.

Another branch of the Drew test of prejudice is the danger that:

> "the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. * * *". 331 F.2d at 88.

This test focuses upon the defendant's right to separate, distinct jury consideration of the facts and law relating to each charge. The income tax counts raised complex issues

of their own.

United States v. Quinn, 365 F.2d 256 (7th Cir. 1966) illustrates the proper application of the rule in Drew and of the cautionary words of Hill. In Quinn, the court held that even the most optimistic seer would hesitate to endanger his reputation by claiming that a jury could, with complex and confusing issues, differentiate the proof as to different counts.

In United States v. Cahn, 75 CR. 645 (E.D.N.Y.), the defendant was charged with mail fraud, false statement charges and counts of perjury allegedly committed when he testified before the Grand Jury. On a motion to sever, Judge Dooling, in his opinion of January 9, 1976, stated, in pertinent part:

> "The very much more substantial question raised by the perjury counts is the question of severance. It is concluded that the motion to sever the perjury Counts for separate trial must be granted. Certain of the evidence introduced in support of the other Counts of the indictment may well be relevant to the Counts in question, but the requirements of Rule 8(a) are scarcely met if they have been met at all."

There was no justification for combining the "perjury" and "cheating" on the income tax charges as they stood with the

Hobbs Act counts. The income tax counts should have, if at all, been made in a separate indictment. The selective tacking of the income tax perjury and evasion counts onto the Hobbs Act violations amounted to no less than a trial tactic calculated to exploit and abort the defendant's constitutional right against self-incrimination; to place him in an untenable position with respect to testifying; to admit evidence otherwise inadmissible; and to prejudice him at the trial by labelling him as a perjurer and cheat, while attempting to convict him under the main thrust of the indictment on Hobbs Act violations.

The Trial Court erred in denying defendant's motion to sever Counts One through Ten from Counts Eleven through Fifteen.

POINT III

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISMISS COUNT FOURTEEN OF THE INDICTMENT ON THE GROUND THAT THERE WAS NO EVIDENCE CONNECTING DEFENDANT TO RUSSO BROTHERS SERVICE STATION, INC., THE NAMED VICTIM IN THAT COUNT.

Count Fourteen of the Indictment charged the defendant with extorting Hobbs Act moneys from Russo Brothers Service Station, Inc.*.

At a voir-dire hearing during trial (688-707), Mr. Santo Russo testified that he was employed by Russo Brothers Service Center, Inc. and that his testimony was the same he had given before the Grand Jury on January 7, 1976 (694, 696).

At the closing of the hearing, defendant moved to dismiss Count Fourteen of the Indictment on the basis of a material variation. The Indictment charged that the victim of the alleged extortion was Russo Brothers Service Station, Inc., when, in fact, the only evidence introduced was that the extortion victim was Russo Brothers Service Center, Inc. (702). The Government offered no explanation for this difference in cor-

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*The name charged in the Indictment and the name under which the Government introduced evidence are underscored to avoid confusion.

porate names. The Court denied defendant's application on the grounds that the variation was not material and that pursuant to Rule 12(b), the motion was untimely (704).

The defendant had a right to be tried only on those charges presented in an indictment returned by the Grand Jury. The variation between the charge contained in the Indictment and the proof at trial was a serious deprivation of such right and should not be treated as harmless error. See Stirone v. United States, supra; United States v. Consolidated Laundries Corporation, supra. In conjunction therewith, there is an absolute right of the defendant under the Fifth and Sixth Amendments of the United States Constitution to be fully and fairly apprised of the nature and extent of the charges against him, together with the identity of the alleged victims. See United States v. Agone, supra.

In the instant case, the Government was allowed to offer proof that the defendant had extorted money from a corporate victim other than the one named in the Indictment.

Defendant's preparation for trial and his defense at the trial was based upon the named victim charged in the Indictment. The difference between the charge in the Indictment and the

proof was irreconcilable. The prejudice was inherent.

The allowance of proof by the Court as to an alleged extortion from Russo Brothers Service Center, Inc. was outside the Indictment read to the jury at the beginning of trial. As in Stirone v. United States, supra, the effect was to amend the Grand Jury Indictment. Under Rule 12, an objection on this ground is not waived and may be made at any time during the proceedings. See Point I, supra, pp. 18-19.

The Trial Court submitted Count Fourteen for the jury's deliberation as it stood (2689-2691). The jury was thus asked to deliberate on a multiple-count indictment, with respect to a named victim concerning which there was no evidence before them. Accordingly, the Trial Court erred not only in permitting testimony as to Russo Brothers Service Center, Inc., but in allowing the jury to deliberate on that evidence.

Without any evidence to support a finding of guilt on Count Fourteen, the jury's verdict was improper. Count Fourteen should be dismissed.

POINT IV

THE TRIAL COURT MADE SUBSTANTIAL AND PREJUDICIAL ERROR IN ITS RULINGS ON THE ADMISSIBILITY OF EVIDENCE

A

THE DEFENDANT WAS SEVERELY HAMPERED AND PREJUDICED BY THE DUPLICITY OF THE GOVERNMENT AND THE ERROR OF THE TRIAL COURT WITH RESPECT TO THE WITNESS, RANDOLPH W. TAYLOR, JR.

Randolph W. Taylor, Jr. was the only eye-witness to testify as to the alleged delivery of money from one of the victims to the defendant (1409-1412). He was a crucial witness for the Government and was so considered by the jury. In fact, the first testimony requested by the jury to be reread after they commenced deliberation was that of Taylor (2745).

On direct examination, Taylor testified that during 1966 to 1971 he had been employed by the Long Island State Parkway Police as a patrolman (1406-1407). He further testified to the occurrence taking place in 1968 while he was moonlighting in the garage owned by Sal Gullo, the principal of a named victim (1409).

During the further course of his testimony, Taylor stated that he had been charged with two crimes. These were statutory rape which he claimed had been dismissed, and criminal mischief which he stated had been reduced to harrassment and dismissed (1424). Additionally, he testified that he was not under fire when he "resigned" from the Parkway Police in 1971, and, at the time, there were no charges pending against him (1431).

Under date of May 4, 1976, the Government furnished the defendant with a list of its witnesses (Mc A*). Randolph W. Taylor, Jr. was listed therein as "Randy Taylor - address unknown". Since neither his connection with the case nor his address was known, defendant was unable to investigate Taylor until defendant was furnished, on trial, with a Government investigator's report**. This report, dated October 7, 1974, substantially predating the Government's list of witnesses, conclusively demonstrates that the Government was fully aware of the witness's full name and address at the time the defendant was advised that Taylor's address was unknown.

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* Refers to defendant McGrath's Appendix.

** Govt. Ex. 3500-35 for Id., (Mc A)

It was only after Taylor had left the witness stand that defendant's investigation uncovered facts showing substantial discrepancies, if not lies, in Taylor's testimony, which would have been crucial to the proper cross-examination of the witness (1415). Immediately after obtaining this material, the defendant asked the Government to recall Taylor. The Government refused (1518).

The defendant then delivered a subpoena to the United States Marshal for service upon Taylor. The Marshal's office refused to accept the subpoena until the Court "so ordered" the same (1592). Thereafter, the Court "so ordered" the subpoena. The subpoena was subsequently returned by the Marshal as unserved (2394)*. When faced with the possibility that he would be unable to serve Taylor, the defendant asked the Court if, in the event Taylor could not be located in time, a Police Department officer could testify and produce departmental records concerning Taylor. The Trial Court advised:

> "THE COURT: You can do it either way".
> (1519)

Having ascertained that the U.S. Marshal could not serve Taylor, defense counsel produced, under subpoena, Lieutenant Cosgrove, of the Long Island State Parkway Police, to testify

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*Deft. Ex. CJ for Id.,(Mc A)

from departmental records (1772-1774).

During a sidebar called by the Government, the Trial Court refused to allow Lt. Cosgrove to testify, over defend-'s offer of proof (1772-1774).

Frustrated, defendant marked Taylor's departmental records for identification*, and there were other offers of proof concerning these documents**. The Court refused their admission (2394-2400).

These offers and proof showed, inter alia, that, contrary to his testimony, Taylor had pleaded guilty to an offense; had pleaded guilty to various unsavory departmental charges; had been suspended from the police force while working for the Gullo garage; and that his resignation was, in reality, a condition that he would not return to the force if criminal charges against him were dismissed. Without belaboring this point, the Court is respectfully referred to Deft. Ex. CK for Id.

Finally, the Trial Court, satisfied that defendant did not, in fact, know of this evidence when Taylor had testified, attempted to cure its error by addressing the jury with a casual

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*Deft. Ex. CK for Id., (Mc A)
**1514, 1644-1665, 2394-2400.

instruction in the form of a stipulation (2428-2438). This only compounded the error, did not give the jury all the facts, did not cure the substantial prejudice engendered, and was no substitution for the effective cross-examination of Taylor.

The duplicity in furnishing the defendant with an obviously and intentionally incomplete list of witnesses in order to protect a vulnerable key witness should not be countenanced. It served to tie the defendant's hands and the prejudice resulting from defendant's inability to adequately cross-examine the witness cries out. All of the relevant facts concerning Taylor were not before the jury. They jury was never given a full and fair opportunity to properly assess the witness's credibility and motivation.

B

THE TRIAL COURT ERRED IN PERMITTING THE WITNESS, JOSEPH FOLEY, TO TESTIFY AS TO PREJUDICIAL AND INFLAMMATORY HEARSAY STATEMENTS NEITHER RELATED NOR CONNECTED TO ISSUES RAISED AT THE TRIAL.

The pertinent provisions of Rule 801 are as follows:

"Rule 801. Definitions

The following definitions apply under this article:

* * * *

(b) Declarant. A 'declarant' is a person who makes a statement.

(c) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:-

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, * * *".

The Government called Mr. Joseph Foley as a witness (838). A side bar was held as to the pertinency and relevancy of his testimony. Over objection, Foley, a felon convicted of grand larceny, was permitted to testify in substance about a conversation he had had with LaGuardia in 1972 in a Mineola bar. Foley had just recently lost his job as manager of a service station located on the Southern State Parkway (865).* He testified:

"Q. Then what did he tell you?

A. Well, he told me that he would ar-

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* His conviction for grand larceny involved the same service station.

> range to have dinner some evening with Mr. McGrath and that we could work something out. It would probably cost me--I remember the figure of $10,000--to get back on the parkway". (868)

The conversation never went further, and Foley never met the defendant (869).

The Government argued that this testimony was offered pursuant to Federal Rule of Evidence 801(d)(1)(B), to rebut the implication of recent fabrication by LaGuardia. The Trial Court erred in allowing this testimony. Highly inflammatory, it neither was parallel to nor consistent with any of the testimony given by LaGuardia.

In United States v. Dorfman, 470 F.2d 246, this court addressed itself to the question of admissibility of prior consistent statements. In Dorfman, the extra-judicial statements made by a prosecution witness were held admissible, on the ground they were directly related to the receipt of the bribe and the existence of the bribe as charged in the indictment.

In the case at bar, Foley's testimony as to his conversation with LaGuardia did not relate either to the extortion charged against the defendant, or to LaGuardia's testimony (386).

The testimony of Foley was not as to a prior consistent statement in accordance with Federal Rule of Evidence 801(d)(1)(B). Unrebuttable, it only served to blacken the defendant's character while in no way relating to either the extortion count or LaGuardia's inconsistent statements on trial concerning such count.

The jury had before it an unreliable conversation from an unreliable source, which the Government successfully used to prejudice the jury against the defendant.

C

THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING CERTAIN CHARTS, PREJUDICIAL AS TO SIZE, LAYOUT AND CONTENT, TO BE MARKED FOR IDENTIFICATION AND EXHIBITED TO THE JURY.

Over defendant's objection, the Government marked three charts for identification in support of the income tax counts (1520-1526, 1535)*. After being marked, the charts were placed in front of the jury. Each chart, psychologically artful, con-

* Govt. Exs. 73, 74 and 75 for Id., (Mc A)
These charts, larger than an average courtroom blackboard will be handed up on argument.

tained a heading in large block print which assumed, as fact, the charges which the Government intended to prove. The headings, e.g., "Additional Income" and "Income from Towers", were so subtly brazen that the jury could only assume that the contents of the charts were proven fact.

It is, of course, basic that the admissibility of charts is discretionary with the court. But where the presentation was so couched that it was likely to draw the jury's attention away from the basic questions of the extent to which the contents of the charts were true and accurate, the Court abused its discretion by allowing them to be exhibited to the jury. United States v. Ellenbogen, 365 F.2d 982, cert. denied, 386 U.S. 923.

CONCLUSION

IN VIEW OF THE FOREGOING, IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF CONVICTION OF APPELLANT, JOHN McGRATH, APPEALED FROM, SHOULD BE REVERSED AND DISMISSED.

Respectfully submitted,

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of Counsel.

Service of TWO copies of
the within is
hereby admitted this day
of , 197

Attorney for